

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 19 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Respondent,

v.

DEMETRIUS MOORE,

Petitioner.

2 CA-CR 2008-0164-PR
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-046933

Honorable Michael J. Cruikshank, Judge

REVIEW GRANTED; RELIEF DENIED

Demetrius Moore

Florence
In Propria Persona

B R A M M E R, Judge.

¶1 After a 1995 jury trial, petitioner Demetrius Moore was convicted of nineteen charges including first-degree murder based on felony murder, kidnapping, aggravated assault, attempted armed robbery, first-degree burglary, and conspiracy. The charges arose from a home invasion and failed drug “rip off” during which one of the home’s occupants

was killed. Although apparently Moore did not actively participate in the home invasion, codefendants identified him as the person who had organized and orchestrated the crimes. The trial court sentenced him to life imprisonment for murder and imposed lesser, aggravated, consecutive and concurrent terms for the other convictions. This court affirmed the convictions and sentences on appeal. *State v. Moore*, No. 2 CA-CR 96-0184 (memorandum decision filed May 29, 1997). In this petition for review, Moore challenges the trial court's denial of post-conviction relief.

¶2 Moore filed his first petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., in 1999. According to our memorandum decision denying relief in that case, *State v. Moore*, No. 2 CA-CR 00-0116-PR (memorandum decision filed May 23, 2000), Moore had alleged in that petition for post-conviction relief his codefendant, Anthony Scott, had recanted his trial testimony, which Moore asserted was newly discovered evidence as contemplated by Rule 32.1(e). *Id.* ¶ 1. Scott was one of the state's two key witnesses at trial and "had received a probation-available plea offer in exchange for his testimony against [Moore] at trial." The trial court rejected Moore's claim concerning Scott's purported recantation in 1999, finding the unsworn recantation did not satisfy the criteria of Rule 32.1(e). Further, the trial court found Scott's credibility was "highly questionable" and his recantation thus unlikely to have affected the jury's verdicts. Consequently, the court denied post-conviction relief without an evidentiary hearing, and we upheld its ruling on review. *Id.*

¶3 In August 2007, Moore initiated the present proceeding by filing another notice of post-conviction relief. In his pro se notice, he again claimed there existed newly discovered evidence for purposes of Rule 32.1(e), contending Scott would now testify that his trial testimony implicating Moore had been coerced by both the prosecutor and defense counsel. In addition, Moore asserted a claim of actual innocence pursuant to Rule 32.1(h), which he supported with the affidavit of another codefendant, Eduardo Contreras, whose trial had been severed from Moore's. Contreras's affidavit contains only the conclusory statements that

Moore had no prior knowledge of, involvement in, or any knowledge after the fact of these crimes. He was never present at any moment in the process of these crimes and was completely uninvolved.

He has been unjustly prosecuted and convicted of these crimes . . . which he did not commit.

According to the trial court's minute entry ruling, Contreras had not testified at trial, so his affidavit represented only the repudiation of out-of-court statements he had made implicating Moore.

¶4 In response to Moore's notice and supporting affidavits, the state asserted that Moore had raised the same claim of newly discovered evidence concerning the testimony of Anthony Scott in his first Rule 32 proceeding and was precluded from raising it again. *See* Ariz. R. Crim. P. 32.2(a). The state did not respond specifically to Moore's assertion of actual innocence.

¶5 After Moore had filed a reply to the state’s response, the trial court dismissed his notice. In its minute entry order, the court ruled Moore was precluded from again asserting that Scott’s recantation constituted newly discovered evidence. And it found the affidavit of Eduardo Contreras failed to satisfy the definition of newly discovered evidence or the criteria for establishing actual innocence under Rule 32.1(h).

¶6 We will not disturb an order denying post-conviction relief for lack of a colorable claim unless the trial court has clearly abused its discretion. *See State v. Sanchez*, 200 Ariz. 163, ¶ 10, 24 P.3d 610, 613 (App. 2001). We find no abuse in this case. Moore argues his latest claim of newly discovered evidence is not precluded because he did not previously assert that the prosecutor, Kenneth Peasley, had “knowingly us[ed] perjured testimony to obtain a conviction” and thus committed prosecutorial misconduct. Hence, Moore maintains, his subsequent petition raised a new, nonprecluded claim that Scott had been pressured by the prosecutor and defense counsel to “ma[k]e up facts” and “testify falsely about [Moore]’s involvement in the case.”

¶7 Because we do not have access to the complete record of Moore’s first post-conviction proceeding, we cannot determine precisely what claims he asserted then with respect to Scott’s testimony at trial. We note, however, that, in our previous memorandum decision, we quoted at length from the trial court’s ruling on Moore’s first petition. Among the portions of that ruling, we quoted the following, which was in the final paragraph of the court’s order:

Defendant argues that police coerced false testimony on the part of Scott by threatening him with the death penalty in

order to inculcate the defendant. An assessment of witness information and testimony, however, reveals serious conflicts between the information given to police at the time of the investigation, pretrial interviews, defendant's trial and the statements allegedly made to defense counsel. Co-defendant Scott made his exculpatory statements only after his probation term commenced and was very clear that he would be unwilling to make these statements under oath. Indeed, Scott did not even contact defense counsel, rather his mother did. Moreover, Scott testified at trial as to the defendant's involvement in the murder. His credibility, therefore, is highly questionable and his recanted testimony is unlikely to alter the verdict in this case. As such, the evidence would not likely have altered the verdict as required and the claim does not have the appearance of validity entitling the defendant to an evidentiary hearing on this ground

Moore, No. 2 CA-CR 00-0116-PR, ¶ 2.

¶8 Although Moore's current claim that Scott's trial testimony against Moore was coerced and false is apparently different from the claim of coercion he asserted in his first post-conviction petition, the trial court's previous determination that Scott's credibility was questionable and his recantation therefore suspect is equally applicable to Moore's present claim. We conclude the record supports the court's determination that Moore's notice of post-conviction relief failed to describe a colorable claim of newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e), and we find no abuse of discretion in the court's refusal to hold an evidentiary hearing before dismissing that notice. *See State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993) (colorable claim meriting evidentiary hearing one that, if proven, might have yielded different outcome).

¶9 We similarly find no abuse of discretion in the trial court's determination that the affidavit of Eduardo Contreras neither qualified as newly discovered evidence for

purposes of Rule 32.1(e)¹ nor supplied clear and convincing evidence that would have prevented a reasonable jury from finding Moore guilty beyond a reasonable doubt. *See* Ariz. R. Crim. P. 32.1(h) (actual-innocence claim requires presentation of facts “sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt”). As we already observed, Contreras’s affidavit was brief and conclusory. The court found it unconvincing, in part, because “Ramirez, the other co-defendant who extensively testified against [Moore], ha[d] not recanted his testimony.” We find the court’s reasoning sound and defensible, not arbitrary or capricious.

¶10 Having found no abuse of the trial court’s discretion, we grant the petition for review but deny relief.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOHN PELANDER, Chief Judge

JOSEPH W. HOWARD, Presiding Judge

¹It appears the trial court’s minute entry contains a typographical error in the second line on page three. Based on the two sentences immediately preceding that statement, we assume the court intended to write “Eduardo Contreras was *available* to testify at trial. Therefore, his affidavit is not considered ‘newly discovered’ evidence.” (Emphasis added.)